

Remarks

This Amendment is in response to the Decision on Appeal dated **October 19, 2009**, in which the Examiner was affirmed as to the rejection of claims 23-25 and 43, but reversed as to claims 44 and 45.

Claims 44 and 45 have been written in independent form including all of the recitations of claim 43 from which they previously depended. Claim 43 has been cancelled.

Independent claim 23 has been amended to include the same percentage difference recited in claim 44 and is seen to be allowable over the art of record on that basis. See page 8 of the Decision on Appeal.

Entry of the amendment of claim 23 does not require reopening of prosecution because the basis for patentability over the cited art has been resolved in the Decision on Appeal. The amendment to claim 23 is permissible and should be entered. As stated in MPEP 1214.07:

Sometimes an amendment is filed after the Board's decision which does not carry into effect any recommendation made by the Board and which presents a new or amended claim or claims. ... If the amendment obviously places an application in condition for allowance, regardless of whether the amendment is filed with an RCE, the primary examiner should recommend that the amendment be entered, and with the concurrence of the supervisory patent examiner, the amendment will be entered. ...

Where the amendment cannot be entered, the examiner should write to the appellant indicating that the amendment cannot be entered and stating the reason why. The refusal may not be arbitrary or capricious.

Claims 24-25 depend from amended claim 23 and are allowable on the basis of the amendment of claim 24.

No new claims have been added.

All of the remaining claims are in form and condition for allowance. A Notice of Allowance in the next action is therefore respectfully requested.

Respectfully submitted,
VIDAS, ARRETT & STEINKRAUS

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By: /Walter J. Steinkraus/
Walter J. Steinkraus
Registration No.: 29592

6640 Shady Oak Rd., Suite 400
Eden Prairie, MN 55344-7834
Telephone: (952) 563-3000
Facsimile: (952) 563-3001

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